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## NOTES

### THE MINISTERIAL EXCEPTION TO TITLE VII: THE CASE FOR A DEFERENTIAL PRIMARY DUTIES TEST

Venerable legal traditions protect both religious freedom and civil rights, but the two conflict when religious organizations discriminate on the basis of sex, race, or other statutorily prohibited criteria in the selection of their spiritual leaders. Although constitutional law typically disfavors religious exemptions from general laws, religious employers have consistently — and successfully — claimed an exemption from employment discrimination laws. This “ministerial exception” allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers.<sup>1</sup> Nearly all courts determine ministerial status under a primary duties test that considers whether an employee’s job responsibilities render him “important to the spiritual and pastoral mission of the church.”<sup>2</sup> If so, the court will bar the employee’s discrimination claim in order to protect church autonomy. Although the Supreme Court has never endorsed the ministerial exception,<sup>3</sup> every circuit court to have considered the issue has adopted the exemption.<sup>4</sup>

Courts widely agree on the constitutional foundation for the ministerial exception. Most courts justify it by relying primarily on the Free Exercise Clause and its special solicitude for the church-minister relationship,<sup>5</sup> and many also recognize the exception to avoid entanglement concerns under the Establishment Clause.<sup>6</sup> Although no court has based the exception on the First Amendment’s expressive association right, concern for a denomination’s ability to express its message through its choice of minister might further justify the exemption.<sup>7</sup>

But courts and commentators have largely ignored practical difficulties with the exemption’s application. To determine whether an employee qualifies as a minister, courts routinely scrutinize the em-

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<sup>1</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006).

<sup>2</sup> *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

<sup>3</sup> The Supreme Court has repeatedly denied certiorari in ministerial exception cases. See, e.g., *Petruska v. Gannon Univ.*, 127 S. Ct. 2098 (2007) (mem.); *Tomic v. Catholic Diocese of Peoria*, 127 S. Ct. 190 (2006) (mem.).

<sup>4</sup> See *Petruska*, 462 F.3d at 303–04.

<sup>5</sup> See, e.g., *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972).

<sup>6</sup> See, e.g., *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991).

<sup>7</sup> See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 84–86 (2001); Laura B. Mutterperl, Note, *Employment at (God’s) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L. L. REV. 389, 415–16 (2002).

ployee's job duties to assess the spiritual significance of particular responsibilities.<sup>8</sup> In so doing, courts risk impinging on free exercise rights by substituting a secular judgment for the church's conception of an employee's contribution to its spiritual mission. By conducting this intrusive inquiry, courts also become entangled with religion, potentially contravening the Establishment Clause.<sup>9</sup> Application of the ministerial exception thus risks violating the Religion Clauses<sup>10</sup> even as it attempts to vindicate those constitutional protections.

This Note argues that the First Amendment provisions that motivate the existence of the ministerial exception should also guide its application. Courts could cure the constitutional problems inherent in the primary duties test by adopting a rule of deference to a religious organization's reasonable claim concerning the spiritual significance of an employee's job duties. Instead of independently inquiring into the religious weight of different job responsibilities, courts would credit the church's views on the matter. Part I describes the history of the ministerial exception. Part II details the constitutional bases for the exception under both Religion Clauses, and argues that the expressive association right further justifies the ministerial exception even though the case law has not yet recognized this rationale. Part III evaluates the primary duties test used to trigger the ministerial exception, concluding that courts frequently risk violating the Religion Clauses' protections when assessing an employee's spiritual significance to a religious organization. Part IV encourages adoption of a deferential primary duties test to cure these constitutional defects. It outlines how a deferential test would work and describes doctrinal analogues from the academic and professional promotion and expressive association contexts. Part V responds to potential criticisms of a deferential primary duties test.

## I. HISTORY OF THE MINISTERIAL EXCEPTION

Congress enacted Title VII of the Civil Rights Act of 1964<sup>11</sup> to prohibit employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>12</sup> Although Congress specifically allowed reli-

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<sup>8</sup> See, e.g., *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802–05 (4th Cir. 2000).

<sup>9</sup> See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc).

<sup>10</sup> The Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

<sup>11</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2000).

<sup>12</sup> *Id.* § 2000e-2(a). Title VII applies to all employers with at least fifteen employees, including religious employers. *Id.* § 2000e(b).

gious employers to prefer members of their own faith in employment,<sup>13</sup> it left them liable for discrimination on the basis of the other protected classifications.<sup>14</sup> For example, under Title VII's plain text, religious denominations theoretically could face sex discrimination liability for refusing to ordain women.

Because a church's decisions regarding spiritual leaders "may at times result from preferences wholly impermissible in the secular sphere,"<sup>15</sup> conflict quickly arose between Title VII and the Religion Clauses. In 1972, the Fifth Circuit first articulated the need to recognize a ministerial exception to Title VII to avoid interference with the church-clergy relationship and to protect religious liberty.<sup>16</sup> The court refused to consider a sex discrimination suit brought by an ordained minister against her church for distributing salary and benefits in a discriminatory manner because the court considered the church-minister relationship to be "of prime ecclesiastical concern."<sup>17</sup> Applying Title VII to that relationship would impermissibly "cause the State to intrude upon matters of church administration and government."<sup>18</sup> Over the next thirty-five years, eight circuits followed the Fifth Circuit's lead and explicitly adopted the ministerial exception.<sup>19</sup>

Courts soon extended the exemption to employees who lacked formal ordination but whose duties nonetheless contributed in important ways to the spiritual mission of the church.<sup>20</sup> To determine whether an employee qualifies as a minister for purposes of the exception, the Fourth Circuit invented the primary duties test, which considers whether "the employee's primary duties consist of teaching, spreading

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<sup>13</sup> *Id.* § 2000e-1(a).

<sup>14</sup> *See* *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1166-67 (4th Cir. 1985) (concluding that Congress intended to impose liability on religious organizations for all other forms of employment discrimination).

<sup>15</sup> *Id.* at 1170-71.

<sup>16</sup> *See* *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972). Courts have extended the exception to other antidiscrimination laws in the employment context. *See* *Ross v. Metro. Church of God*, 471 F. Supp. 2d 1306, 1309 (N.D. Ga. 2007) (cataloguing instances of that extension).

<sup>17</sup> *McClure*, 460 F.2d at 559.

<sup>18</sup> *Id.* at 560.

<sup>19</sup> *See* *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006) (describing itself as the eighth federal circuit to adopt the exception); *see also* *Rweyemamu v. Cote*, No. 06-1041-cv, 2008 WL 746822, at \*8 (2d Cir. Mar. 21, 2008) (adopting the ministerial exception in the Second Circuit). For an extensive analysis of ministerial exception cases that have arisen since the exception was first recognized, see Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86 (2002). The ministerial exception arises most commonly in cases alleging sex discrimination, although it has been invoked in other cases of discrimination, including those involving race and national origin. *See id.* at 117-18, 147-48 tbl.3. The exception most frequently bars claims of discrimination in hiring, firing, and promotion. *See id.* at 144-46 tbl.2 (summarizing the fact patterns in ministerial exception cases).

<sup>20</sup> *See* *Rayburn*, 772 F.2d at 1169. For an argument that this extension is proper and that constitutional and practical problems would result if the ministerial exception were limited to ordained ministers, see *infra* section V.D.

the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”<sup>21</sup> Courts applying the primary duties test scrutinize an employee’s job duties and assess the spiritual significance of those duties in relation to the church’s religious mission.<sup>22</sup> Nearly all circuits have adopted the Fourth Circuit’s articulation of the primary duties test.<sup>23</sup> As a result, a variety of positions in churches have been categorized as ministerial, from a press secretary<sup>24</sup> to a choir director.<sup>25</sup>

Notably, the ministerial exception has not been automatically extended to contexts beyond employment discrimination laws. Courts have consistently recognized that actions involving the church-minister relationship that violate other laws, such as criminal laws, remain subject to First Amendment balancing tests.<sup>26</sup>

## II. CONSTITUTIONAL JUSTIFICATIONS FOR THE MINISTERIAL EXCEPTION

Courts adopting the ministerial exception have based the exemption on the specific guarantees of both Religion Clauses and a general principle of church autonomy that inheres in the First Amendment.<sup>27</sup>

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<sup>21</sup> *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

<sup>22</sup> See, e.g., *Petruska*, 462 F.3d at 307. Courts conduct this inquiry independently, without deferring to the church’s conception of the spiritual significance of particular responsibilities. See, e.g., *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283 (5th Cir. Unit A July 1981) (“While religious organizations may designate persons as ministers for their religious purposes . . . , bestowal of such a designation does not control their extra-religious legal status.”).

<sup>23</sup> See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C. Cir. 1996). The Fifth Circuit has instead adopted a three-part test for ministerial status that subsumes the primary duties test as its third factor. See *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999). The other two factors that court considers are whether the employee was hired according to religious criteria and whether the employee was “qualified and authorized to perform [religious] ceremonies.” *Id.*

<sup>24</sup> See *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

<sup>25</sup> See *Starkman*, 198 F.3d at 177.

<sup>26</sup> See, e.g., *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (D.C. Cir. 1990) (rejecting a hypothetical argument that the ministerial exception would immunize churches from liability under homicide statutes if they forced their ministers to play Russian roulette as part of the hiring process because “[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test”); see also Shawna Meyer Eikenberry, Note, *Thou Shalt Not Sue the Church: Denying Court Access to Ministerial Employees*, 74 IND. L.J. 269, 287–92 (1998) (discussing other areas in which courts have permitted suits that implicate the church-clergy relationship, such as suits brought by congregation members against churches for failure to prevent sexual abuse by clergy members).

<sup>27</sup> Under this view, antidiscrimination laws do not cover a church’s employment decisions regarding its ministers because the government does not have power under the Constitution to regulate those relationships. See *Rweyemamu v. Cote*, No. 06-1041-cv, 2008 WL 746822, at \*6 (2d Cir. Mar. 21, 2008) (describing how “the ministerial exception cannot be ascribed solely to judicial self-abnegation,” but instead “is also required by the Constitution”). A different framework would view the exception as exactly that: an exemption carved out of otherwise prevailing civil rights

However, courts have ignored an equally strong basis for the exception: the expressive association right. This Part describes the traditional justifications for the ministerial exception, and then argues that the expressive association right further supports the exception by vindicating a religious organization's constitutionally protected control over its spiritual message. Analysis of all three constitutional justifications is important because the Supreme Court's First Amendment jurisprudence has undergone significant changes since courts first recognized the ministerial exception.

### A. *The Free Exercise Clause*

Many courts have adopted the ministerial exception because “[t]he choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief,” which would contravene free exercise rights.<sup>28</sup> Indeed, the first case adopting the ministerial exception did so under the Free Exercise Clause alone,<sup>29</sup> and courts have placed great emphasis on the Supreme Court's declaration that “[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”<sup>30</sup>

When courts first adopted the ministerial exception, they subjected Title VII to strict scrutiny,<sup>31</sup> weighing a church's interest in the unburdened selection of its spiritual leaders against the government's interest in enforcing antidiscrimination laws.<sup>32</sup> Although courts frequently ac-

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standards to accommodate religious organizations even when not required by the Constitution. See *Schleicher v. Salvation Army*, No. 07-1333, 2008 WL 516892, at \*2 (7th Cir. Feb. 28, 2008) (stating that “the ministers exception is a rule of interpretation, not a constitutional rule,” which assumes that “Congress does not want courts to interfere in the internal management of churches”). The distinction between frames is subtle, but highlights different problems inherent in each option. If the exception is beyond the reach of antidiscrimination laws altogether, then the same constitutional rationales underlying the exception could impede other civil rights legislation. If the exception is a special accommodation, then religious groups' interests would depend on governmental beneficence in granting that accommodation. This Note, in accordance with most courts, adopts the former frame — that governmental power does not extend to regulation of the conduct protected by the ministerial exception — but recognizes the difficulties with this frame. For an analysis of why the exception does not unduly imperil civil rights laws, however, see *infra* section V.C.

<sup>28</sup> *Van Osdol v. Vogt*, 908 P.2d 1122, 1126 (Colo. 1996); see also *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (recognizing that, in some contexts, “belief and action cannot be neatly confined in logic-tight compartments”).

<sup>29</sup> See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

<sup>30</sup> *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

<sup>31</sup> Under *Sherbert v. Verner*, 374 U.S. 398 (1963), the government had to establish that it had a compelling interest and that no less restrictive means could achieve that interest. *Id.* at 403.

<sup>32</sup> See, e.g., *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985).

knowledged the vital state interest in preventing workplace discrimination,<sup>33</sup> they routinely held that the balance of interests weighed in favor of a religious organization's unfettered liberty to select its spiritual leaders.<sup>34</sup>

Even after the Supreme Court's 1990 decision in *Employment Division v. Smith*<sup>35</sup> eliminated strict scrutiny in most cases involving the application of neutral, generally applicable laws,<sup>36</sup> circuit courts confirmed the vitality of the ministerial exception.<sup>37</sup> For three reasons, these courts have rightly concluded that *Smith* neither undermines nor precludes the ministerial exception. First, *Smith* retained strict scrutiny in cases coupling free exercise claims with other constitutional protections.<sup>38</sup> Because the ministerial exception presents a "hybrid situation" — combining free exercise protections with both Establishment Clause and expressive association safeguards<sup>39</sup> — it remains viable.<sup>40</sup>

<sup>33</sup> *Id.* at 1168.

<sup>34</sup> *Id.* at 1169 (adopting the ministerial exception because "[w]hile an unfettered church choice may create minimal infidelity to the objectives of Title VII, it provides maximum protection of the First Amendment right to the free exercise of religious beliefs"); *see also* Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1102 (9th Cir. 2004) (concluding that the ministerial exception must exist because otherwise "the burden on religious liberty is simply too great to be permissible").

<sup>35</sup> 494 U.S. 872 (1990).

<sup>36</sup> *See id.* at 885. For a discussion of why Title VII likely qualifies as a neutral, generally applicable law, *see* Joanne C. Brant, "Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right To Discriminate, 21 HASTINGS CONST. L.Q. 275, 308–09 (1994).

<sup>37</sup> *See, e.g.,* EEOC v. Catholic Univ. of Am., 83 F.3d 455, 461–63 (D.C. Cir. 1996). A handful of district courts and state courts have held that *Smith* precludes a ministerial exception based on the Free Exercise Clause. *See, e.g.,* Black v. Snyder, 471 N.W.2d 715, 719 (Minn. Ct. App. 1991); *see also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1982–85 (2007) (arguing that *Smith* abrogates the ministerial exception).

<sup>38</sup> *Smith*, 494 U.S. at 881–82; *see also id.* at 882 ("[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."). Courts and commentators have criticized *Smith*'s exception for these "hybrid rights." *See, e.g.,* Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (criticizing the hybrid rights exception as "completely illogical" and refusing to apply it until the Supreme Court clarifies exactly when legal standards should vary under the Free Exercise Clause); Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under Employment Division v. Smith*, 17 REGENT U. L. REV. 77, 78 (2004) (describing the confusion regarding the "unpopular" hybrid rights doctrine). However, the Supreme Court has never retreated from the hybrid exception, so it may be used to justify the ministerial exception. *Smith*'s holding "is almost universally despised (and this is not too strong a word) by both liberals and conservatives," Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573, 581 (2003), and so *Smith* itself — and not just the hybrid rights exception — may eventually be overruled.

<sup>39</sup> *See infra* sections II.B–C.

<sup>40</sup> *See Catholic Univ.*, 83 F.3d at 467 (explaining that because the ministerial exception implicates the Establishment Clause in addition to the Free Exercise Clause, "this case presents the kind of 'hybrid situation' referred to in *Smith*"); Mutterperl, *supra* note 7, at 415–16 (arguing that

Second, *Smith* was concerned only with protection for individuals and did not consider a different dimension of the Free Exercise Clause — protection for churches as institutions.<sup>41</sup> Those two interests raise different issues and demand nuanced rules, at least when “church autonomy is limited to matters of internal church affairs, including the church-clergy relationship, which has no individual religious practice analog.”<sup>42</sup> In fact, the Supreme Court has long acknowledged the constitutional importance of church autonomy and the correlative prohibition of judicial evaluation of religious doctrine or interference with church administration.<sup>43</sup> In protecting church autonomy, the Court has been particularly solicitous of the church-minister relationship,<sup>44</sup> and courts adjudicating ministerial exception cases have drawn on these precedents to conclude that special protection for a church’s relationship with its ministers is steeped in history.<sup>45</sup> *Smith* cited the Court’s church autonomy cases in affirming protection against governmental involvement “in controversies over religious authority or dogma.”<sup>46</sup> Had *Smith* intended to undermine the ability of religious

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the exception survives *Smith* because it combines free exercise and expressive association rights). For an examination of possible hybrid claims to support the ministerial exception and an argument that courts will not be sympathetic to these claims, see Brant, *supra* note 36, at 311–20.

<sup>41</sup> See *Smith*, 494 U.S. at 879 (explaining that the Free Exercise Clause does not “relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability . . .’” (emphasis added) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment))). Some lower courts and commentators have read this language to leave the rights of religious groups under the Free Exercise Clause unresolved. See, e.g., *Catholic Univ.*, 83 F.3d at 462; Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1649, 1656. For the view that *Smith* should extend to religious groups, see Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1176–77.

<sup>42</sup> Corbin, *supra* note 37, at 1989 (arguing, however, that the expressive association right better justifies differential treatment for individuals and religious groups).

<sup>43</sup> See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 715 (1976) (“Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are . . . hardly relevant to . . . matters of ecclesiastical cognizance.”); *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (lauding “a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine”). Although the church autonomy principle is most frequently understood as an element of free exercise protection, some scholars argue that it is better derived from the Establishment Clause. See, e.g., Corbin, *supra* note 37, at 1978, 1986.

<sup>44</sup> See, e.g., *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 11–13, 15–16 (1929). In *Gonzalez*, the Court recognized that the appointment of a chaplain was a “canonical act” and that a plaintiff who was legally entitled to the position under a trust instrument could not seek relief when the church refused to appoint him because that decision, “although affecting civil rights, [had to be] accepted in litigation before the secular courts as conclusive.” *Id.* at 16.

<sup>45</sup> See, e.g., *Catholic Univ.*, 83 F.3d at 460–61. But for a critique of lower courts’ reliance on church autonomy precedents, see Corbin, *supra* note 37, at 1985–87.

<sup>46</sup> *Smith*, 494 U.S. at 877; see also Brady, *supra* note 41, at 1677 (arguing that because religious groups help individuals formulate religious ideas, “the freedom of belief that *Smith* envisions requires protections for religious organizations”); cf. *Corp. of the Presiding Bishop of the Church of*

organizations to control their spiritual message through selection of ministers, it could have clarified that its holding applied to religious groups and individuals alike. Instead, commentators have argued that *Smith*'s reaffirmation of church autonomy indicates that the ministerial exception is outside *Smith*'s scope and that although these claims "could be forced into the new rules, . . . the Court was plainly not thinking about them in those terms."<sup>47</sup>

Third, the ministerial exception does not require a case-by-case determination of the centrality and importance of an individual's religious beliefs — precisely the determination the *Smith* Court sought to avoid.<sup>48</sup> Instead of balancing a particular religious organization's interest in religiously motivated discrimination in each individual case against the government's interest in enforcing Title VII's nondiscrimination protections, courts have balanced these interests in the abstract to arrive at the ministerial exception. Once courts have recognized the exception, they need not balance anew; rather, they must determine only whether the exception is triggered by an employee's ministerial status.<sup>49</sup> Thus, the ministerial exception does not require individualized constitutional analysis because balancing occurs at the wholesale rather than the retail level.

### B. The Establishment Clause

As the Supreme Court recognized in *Lemon v. Kurtzman*,<sup>50</sup> the Establishment Clause restricts governmental interference with church autonomy by limiting entanglement between church and state.<sup>51</sup> Courts adjudicating ministerial exception cases frequently have held that the Establishment Clause mandates the exception to avoid both

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*Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment) (explaining that "[s]olicitude for a church's ability to [define itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well").

<sup>47</sup> Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 36 (2000); see also *Catholic Univ.*, 83 F.3d at 463 ("[W]e cannot believe that the Supreme Court in *Smith* intended to qualify this century-old affirmation of a church's sovereignty over its own affairs.")

<sup>48</sup> See *Smith*, 494 U.S. at 889 n.5 (noting that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice").

<sup>49</sup> See *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 48 F. Supp. 2d 505, 513 (E.D.N.C. 1999) ("The court does not engage in a balancing test to determine if the ministerial exception applies, but merely determines if the individual falls within the exception."), *aff'd*, 213 F.3d 795 (4th Cir. 2000).

<sup>50</sup> 403 U.S. 602 (1971).

<sup>51</sup> See *id.* at 612–13. The *Lemon* test also requires that a statute "have a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion," *id.* at 612, but courts routinely hold that antidiscrimination laws satisfy these two prongs, see, e.g., *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985).

substantive entanglement — “where the government is placed in the position of deciding between competing religious views” — and procedural entanglement — “where the state and church are pitted against one another in a protracted legal battle.”<sup>52</sup> The remedy of reinstatement for a Title VII violation particularly risks entanglement because a secular court may influence a church’s religious tenets if it installs an employee in a position with influence over the development of religious doctrine.<sup>53</sup> Although *Lemon* and its focus on entanglement have been severely criticized,<sup>54</sup> the *Lemon* test has never been expressly overruled. Arguably, then, the ministerial exception represents a rare instance in which the values protected by the Religion Clauses are aligned rather than in tension.<sup>55</sup>

### C. *The Expressive Association Right*

The expressive association right reinforces other First Amendment guarantees, including the freedom of religion.<sup>56</sup> The Supreme Court has recognized that “[a]n individual’s freedom . . . to worship . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group efforts toward th[at] end[] were not also guaranteed.”<sup>57</sup> Although the Court has lauded the right to create religious organizations “to assist in the expression and dissemination of . . . religious doctrine” and warned that judicial interference with the decisions of these expressive associations “would lead to [their] total subversion,”<sup>58</sup> no court has yet justified the ministerial ex-

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<sup>52</sup> *Petruska v. Gannon Univ.*, 462 F.3d 294, 311 (3d Cir. 2006); see also *Rayburn*, 772 F.2d at 1170–71. Procedural entanglement alone would likely not suffice to justify the ministerial exception because it potentially exists in every lawsuit against a religious organization if the government is a party. However, courts have explained that in ministerial exception cases procedural entanglement exacerbates substantive entanglement. See, e.g., *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 957 (9th Cir. 2004).

<sup>53</sup> See *Rayburn*, 772 F.2d at 1171; see also *Rweyemamu v. Cote*, No. 06-1041-cv, 2008 WL 746822, at \*8 (2d Cir. Mar. 21, 2008) (noting that “the presumptively appropriate remedy in a Title VII action is reinstatement”); *Belcove-Shalin*, *supra* note 19, at 149–52 tbls.4–6 (collecting statistics on the frequency with which plaintiffs ask for reinstatement in ministerial exception cases).

<sup>54</sup> See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring in the judgment).

<sup>55</sup> In fact, analyses under the Free Exercise Clause and the Establishment Clause in ministerial exception cases overlap and occasionally duplicate each other. See, e.g., *Smith v. Raleigh Dist. of the N.C. Conference of the United Methodist Church*, 63 F. Supp. 2d 694, 715 n.17 (E.D.N.C. 1999). Although entanglement most commonly occurs through governmental sponsorship or endorsement of religion, the Supreme Court has extended Establishment Clause analysis to actions that burden, rather than aid, religion. See, e.g., *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501–03 (1979). For criticism of the Establishment Clause justification for the ministerial exception, see *Corbin*, *supra* note 37, at 2004–28.

<sup>56</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

<sup>57</sup> *Id.* at 622.

<sup>58</sup> *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1872).

ception under the expressive association right.<sup>59</sup> However, because the church-minister relationship affects the message a religious organization delivers, the expressive association right arguably provides an additional constitutional justification for the ministerial exception.<sup>60</sup>

Protection for a group's message lies at the heart of the expressive association right. The Supreme Court has recognized that forcing a group to accept an unwanted member may imperil that group's expression.<sup>61</sup> For example, in *Boy Scouts of America v. Dale*,<sup>62</sup> the Supreme Court explained that the Boy Scouts had a right to revoke the membership of a gay scoutmaster because "Dale's presence in the Boy Scouts would . . . force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."<sup>63</sup> Similarly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,<sup>64</sup> the Court allowed parade organizers to exclude gay group members who wished to march behind a banner proclaiming their sexual orientation because "the choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control."<sup>65</sup>

The expressive association right provides a potential constitutional basis for the ministerial exception because, as many courts have recognized, ministers disseminate a church's message.<sup>66</sup> For example, the

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<sup>59</sup> At least one religious employer has urged a court to adopt the exception in part on expressive association grounds, but the court did not address this argument because it justified the exception under the Religion Clauses. See *Rosati v. Toledo, Ohio Catholic Diocese*, 233 F. Supp. 2d 917, 919, 922 (N.D. Ohio 2002).

<sup>60</sup> See Tushnet, *supra* note 7, at 84–86; Mutterperl, *supra* note 7, at 416. Even one commentator who argues against the Religion Clause justifications for the ministerial exception acknowledges that the right of expressive association may support the exemption. See Corbin, *supra* note 37, at 2028–29. *But cf.* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1099–1103 (1996) (dismissing expressive association as a rationale to allow religious employers to discriminate). Although the expressive association right might justify the ministerial exception in cases involving the hiring and firing of ministers, it may not be sufficient for claims alleging discriminatory salary and benefits. Hiring and discharge claims are more frequently alleged in ministerial exception cases, however. See *supra* note 19.

<sup>61</sup> See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); see also *Roberts*, 468 U.S. at 623 ("Freedom of association . . . plainly presupposes a freedom not to associate.").

<sup>62</sup> 530 U.S. 640.

<sup>63</sup> *Id.* at 653.

<sup>64</sup> 515 U.S. 557 (1995).

<sup>65</sup> *Id.* at 575.

<sup>66</sup> See, e.g., *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 946 (9th Cir. 1999) ("A church must retain unfettered freedom in its choice of ministers because ministers represent the church to the people."); *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1167–68 (4th Cir. 1985) ("The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large." (citation omitted)).

Third Circuit has recognized that “[a] minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church’s public representative, its ambassador, and its voice to the faithful.”<sup>67</sup> The First Circuit similarly has described how “a religious organization’s fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents,” since it is difficult to “separat[e] the message from the messenger.”<sup>68</sup> Courts have also focused on an employee’s role as conveyor of the church’s message to justify extending the exception to bar the claims of nonordained employees whose primary duties do not immediately reveal an important spiritual connection.<sup>69</sup> Thus, liability under Title VII may impermissibly interfere with a church’s right to select the minister of its choice and the correlative ability to shape and share its message.<sup>70</sup>

### III. APPLICATION OF THE MINISTERIAL EXCEPTION AND PROBLEMS WITH THE PRIMARY DUTIES TEST

Because the ministerial exception has gained broad acceptance in federal courts, many cases accept the constitutional necessity of the ex-

<sup>67</sup> *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006); *see also id.* (“Unlike an individual who can speak on her own behalf, . . . the church as an institution must retain the corollary right to select its voice.”).

<sup>68</sup> *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989).

<sup>69</sup> *See, e.g., Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (barring a church press secretary’s claims because her role was “critical in message dissemination, and a church’s message, of course, is of singular importance”); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 804 (4th Cir. 2000) (holding that a music director functioned as a minister in part because she “was the primary human vessel through whom the church chose to spread its message in song”).

<sup>70</sup> Because the expressive association right is subject to a compelling interest test, *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000), a church could claim immunity on expressive association grounds only if its right to choose its ministers without restrictions outweighed the government’s interest in avoiding employment discrimination. The Supreme Court’s balancing of interests in *Dale* could inform this inquiry. A court adjudicating a ministerial exception case could hold that the government’s interest in enforcing Title VII is similar to New Jersey’s interest in upholding its antidiscrimination laws, but that a religious organization’s right to control its spiritual message via its choice of minister is even more compelling than the Boy Scouts’ analogous claim. *Cf. Eugene Volokh, Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1922 n.10 (2006) (discussing the possibility that “a ‘freedom of religious association’ right exists and is somewhat stronger than the normal freedom of expressive association”). One obvious difference is that race and sex classifications receive heightened scrutiny under equal protection law, whereas sexual orientation — at issue in *Dale* — is not a suspect classification. However, New Jersey’s public accommodation law did not distinguish between sexual orientation and sex or race in granting protection against discrimination, nor did the *Dale* Court in upholding the Boy Scouts’ expressive association right. But for an analysis of how religious claims for exemptions are treated differently by courts depending on whether the discrimination is based on race, sex, or sexual orientation, see Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007).

ception and consider only whether an employee qualifies as a minister.<sup>71</sup> In administering the primary duties test to assess ministerial status, however, judges generally have failed to appreciate that their inquiries into whether employees serve spiritually important roles raise the same Free Exercise and Establishment Clause concerns that motivate the existence of the ministerial exception in the first place.<sup>72</sup>

*A. Problems with the Primary Duties Test*

Two main problems inhere in the primary duties test. First, courts face difficulty in distinguishing religious from nonreligious activities. The Supreme Court has recognized that a church could “understandably be concerned that a judge would not understand its religious tenets and sense of mission” because the line between what is and is not religious “is hardly a bright one.”<sup>73</sup> Compounding this problem, a religious employee’s responsibilities have both quantitative and qualitative components — respectively, the time spent on a duty, and the importance of that duty as compared with the importance of others. Some courts focus on the former to the exclusion of the latter; for example, one district court refused to bestow ministerial status on a teacher because she led students in Bible study for only one hour each day.<sup>74</sup> Other courts have explicitly recognized that a tally of time spent on different responsibilities may not adequately capture the reli-

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<sup>71</sup> See, e.g., *Roman Catholic Diocese*, 213 F.3d at 802 (explaining that the parties agreed on “the validity of the ministerial exception” but “part[ed] company . . . on the narrow question of whether the particular employment positions at issue fall within the ministerial exception”).

<sup>72</sup> A notable exception is Judge Kozinski, who has explained that “[r]eligions vary drastically in their hierarchical and organizational structure, and it is often a tricky business to distinguish spiritual from administrative officials and clergy from congregation. The very invocation of the ministerial exception requires us to engage in entanglement with a vengeance.” *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790, 797 (9th Cir. 2005) (Kozinski, J., concurring in the order denying rehearing en banc). The primary duties test “require[s] continually looking into church affairs to resolve the sensitive question whether a plaintiff is ministerial,” so that “[a]t best,” a court “swaps one entanglement for another.” *Id.* at 798. However, Judge Kozinski raised these entanglement concerns to argue that “adopting a broader ministerial exception would cause more problems than it solves.” *Id.* Several commentators also have argued that application of the primary duties test raises Establishment Clause concerns. See, e.g., Corbin, *supra* note 37, at 2026–28; William S. Stickman, IV, Comment, *An Exercise in Futility: Does the Inquiry Required To Apply the Ministerial Exception to Title VII Defeat Its Purpose?*, 43 DUQ. L. REV. 285, 298 (2005) (arguing that the ministerial exception creates entanglement between the state and religion by necessitating “government inquiry into religious beliefs and roles”). Plaintiffs also have argued that the test risks constitutional violation. For example, one court acknowledged — but summarily dismissed — a plaintiff’s observation that “the ministerial functions test in fact encourages intrusive inquiries into church policy by raising questions about the role of individual employees.” *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

<sup>73</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

<sup>74</sup> *Redhead v. Conference of Seventh-day Adventists*, 440 F. Supp. 2d 211, 221 (E.D.N.Y. 2006).

gious significance of an employee's role.<sup>75</sup> For example, a teacher at a parochial school was deemed a minister even though only one of his thirteen job duties was explicitly religious because nothing proved that "the differing general responsibilities are considered of equal importance."<sup>76</sup>

The difficulty courts have in distinguishing religious from nonreligious job functions produces the second problem with the primary duties inquiry: the test creates inconsistent results that leave religious organizations uncertain whether a court will classify an employee as a minister. As the Supreme Court has recognized, "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."<sup>77</sup> Unfortunately, judicial evaluation of the role of employees — from parochial school teachers<sup>78</sup> to church organists<sup>79</sup> — has not created any discernibly consistent pattern.

These problems raise constitutional concerns in three ways.<sup>80</sup> First, the judicial inquiry into the spiritual import of an employee's role itself may lead to excessive entanglement.<sup>81</sup> The Court has repeatedly cau-

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<sup>75</sup> See, e.g., *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at \*7 (4th Cir. Dec. 29, 1998) (per curiam) (explaining that the quantity of time an employee spends on religious matters must be considered alongside "the degree of the church entity's reliance upon such employee to indoctrinate persons in its theology").

<sup>76</sup> *Id.*

<sup>77</sup> *Amos*, 483 U.S. at 336.

<sup>78</sup> Compare *Clapper*, 1998 WL 904528, at \*8 (holding that a teacher at a Seventh-day Adventist elementary school served as a minister), with *Redhead*, 440 F. Supp. 2d at 221 (holding that a teacher at a Seventh-day Adventist elementary school did not qualify as a minister).

<sup>79</sup> Compare *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988) (holding that a church organist qualified as a minister because he enabled the "choir and congregation to participate in the Catholic liturgy through song"), with *Archdiocese of Wash. v. Moersen*, 925 A.2d 659, 668-70 (Md. 2007) (holding that a church organist did not qualify as a minister), *cert. denied*, 128 S. Ct. 1217 (2008).

<sup>80</sup> Another potential problem with the primary duties test is that it tempts judges to deliver opinions that "read more like religion lessons than jurisprudence." Stickman, *supra* note 72, at 297-98; see also *id.* at 298 ("By reading Title VII ministerial exception cases, one can get a clearer understanding of the American religious experience than of the application of the exception."). For example, one court declared that religious music "serves a unique function in worship by virtue of its capacity to uplift the spirit and manifest the relationship between the individual or congregation and the Almighty," and that "[w]hether spoken or sung, psalms lift eyes unto the hills." *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000). Although this problem likely does not rise to the level of a constitutional violation, ministerial exception opinions are frequently suffused with religious reverence that blur the line between church and state.

<sup>81</sup> The Supreme Court has warned against this kind of intrusive judicial inquiry. In *Amos*, the Court considered whether religious employers could discriminate on religious grounds in hiring employees even for nonreligious jobs. *Amos*, 483 U.S. at 330. The district court had distinguished between religious and nonreligious jobs and had adopted a test to determine whether a job was religious that included language and analysis similar to the primary duties test, such as consideration of the relationship between the "primary function" of the religious activity or "the nature of

tioned that an Establishment Clause violation may result when the state attempts to differentiate between religious and secular benefits.<sup>82</sup> Indeed, “[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.”<sup>83</sup> Second, because courts are poorly equipped to assess the qualitative significance of religious job duties, the primary duties test may lead to erroneous determinations of ministerial status. When courts impose liability even though a church considers an employee to serve a critical religious function, they impinge on free exercise rights by replacing the church’s judgment of spirituality with a secular view. Third, if a church is unable to ascertain in advance whether it will be liable under antidiscrimination employment laws, it may overcorrect and choose employees who serve in ministerial roles with an eye toward litigation rather than in accordance with spiritual precepts.<sup>84</sup> Problems implicating the Religion Clauses arise when, because of uncertainty, churches alter their primary conduct to comply with majoritarian expectations.<sup>85</sup>

#### B. *An Example of the Problematic Primary Duties Test*

The two central problems with the primary duties test are evident in a recent case applying the test. In *Archdiocese of Washington v. Moersen*,<sup>86</sup> a state court held that a church organist, William Moersen, did not qualify as a minister.<sup>87</sup> The court concluded that Moersen’s primary duty of playing the organ was not religious because it did not lead to control of religious services or involve specialized knowledge of the faith.<sup>88</sup> By contrast, a dissenting judge viewed Moersen’s role as ministerial, “compelled by nothing less than the simple reality that

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the job” and “the religious rituals or tenets of the religious organization or matters of church administration.” *Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 594 F. Supp. 791, 799 (D. Utah 1984). The Supreme Court deemed this an “intrusive inquiry into religious belief.” *Amos*, 483 U.S. at 339.

<sup>82</sup> See, e.g., *Hernandez v. Comm’r*, 490 U.S. 680, 694 (1989); cf. *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (explaining that a “[u]niversity would risk greater ‘entanglement’ by attempting to enforce its exclusion of ‘religious worship’ and ‘religious speech’ than by allowing all speakers to use its forum, whether religious or not).

<sup>83</sup> *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

<sup>84</sup> See, e.g., *Amos*, 483 U.S. at 336 (“Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”); *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (identifying “the danger that churches . . . might make [decisions] with an eye to avoiding litigation . . . rather than upon the basis of their own personal and doctrinal assessments”).

<sup>85</sup> Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (warning that “contemporary society exert[s] a hydraulic insistence on conformity to majoritarian standards” on religious communities).

<sup>86</sup> 925 A.2d 659 (Md. 2007), cert. denied, 128 S. Ct. 1217 (2008).

<sup>87</sup> See *id.* at 669–70.

<sup>88</sup> See *id.* at 669.

playing the organ for religious services at a Catholic church is an important facilitation of the liturgies in which Moersen participated.”<sup>89</sup> The majority and dissent also disagreed about the qualitative significance of the organ music to the church’s spiritual mission.<sup>90</sup> Finally, the result in *Moersen* differed from the results in other cases involving church musicians.<sup>91</sup> Although the *Moersen* court attempted to distinguish those cases,<sup>92</sup> religious organizations reviewing precedent will have trouble predicting how courts will perceive the primary duties of church musicians in the future.

The *Moersen* court undermined religious values by discrediting the employer’s assessment of Moersen’s spiritual role. Ultimately, secular courtrooms are inappropriate venues to discern the spiritual significance of job duties.<sup>93</sup> Application of the primary duties test ignores this principle<sup>94</sup> and leads courts to violate the Religion Clauses in the very circumstances in which they attempt to preserve those First Amendment protections.

#### IV. A DEFERENTIAL PRIMARY DUTIES TEST

Courts should modify the primary duties test to eliminate the constitutional problems evident in its application. The best solution would retain the functional emphasis on the primary duties of an employee but defer to a religious organization’s characterization of whether and how an employee contributes to the spiritual mission of the church.<sup>95</sup> Although courts should still ascertain what job functions an employee performed and how much time he spent on each duty, courts should then defer to the church regarding which activities it considered religious and the relative qualitative importance of different job duties. Application of the ministerial exception under this

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<sup>89</sup> *Id.* at 681 (Harrell, J., dissenting). The dissent surveyed the importance of music to a church’s religious mission and concluded that Moersen “enabled and encouraged both the choir and the congregation to worship through music.” *Id.* at 682.

<sup>90</sup> Whereas the majority deemed it “not enough to say that Moersen’s music is central to the church’s method of worship,” *id.* at 668 (majority opinion), the dissent agreed with the church that “because music inheres a vital liturgical significance, the performance of that music is equally as significant,” *id.* at 681 (Harrell, J., dissenting).

<sup>91</sup> See, e.g., *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233, 238 (Mich. Ct. App. 1988).

<sup>92</sup> See *Moersen*, 925 A.2d at 670–77.

<sup>93</sup> See *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1170 (4th Cir. 1985) (“It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church’s determination of ‘God’s appointed.’”).

<sup>94</sup> Even courts that have found employees to be ministers have done so only after intrusive inquiries into the employees’ spiritual contributions. See, e.g., *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 802 (4th Cir. 2000).

<sup>95</sup> In advocating adoption of a deferential primary duties test, this Part assumes that churches would have an opportunity during litigation to articulate the spiritual significance of an employee’s job duties — likely during the summary judgment stage.

modified test would recognize and accommodate the proper domains of courts and churches.<sup>96</sup> Courts would not have to choose among competing religious visions because a rebuttable presumption should dictate that the religious organization's conception of its employees' spiritual functions ordinarily controls. Although courts arguably still might violate rights guaranteed by the Religion Clauses by not granting complete deference, they are less likely to infringe on First Amendment rights when they consider whether primary duties are *clearly* nonreligious, rather than just probably nonreligious.<sup>97</sup> A deferential primary duties test thus avoids the potential constitutional violations inherent in an inquiry that allows the court to substitute its judgment for that of the church regarding religious matters too readily.<sup>98</sup>

Additionally, a deferential primary duties test better accounts for Supreme Court precedent recognizing that courts must tread lightly in matters of defining religion because "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task."<sup>99</sup> Although the late-nineteenth-century Court originally defined religion restrictively, the Court increasingly broadened its understanding until it settled on a definition of religion for free exercise purposes that included "a belief that is sincere and meaningful [and that] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."<sup>100</sup> The Court's broader acceptance of

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<sup>96</sup> Cf. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872) ("It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own."). Ensuring that courts do not act outside their area of competence with respect to religious matters avoids Establishment Clause concerns. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2, 10-11, 43-45, 77 (1998); see also *id.* at 108-09 (arguing that the Establishment Clause bars the government from intruding on "inherently religious" matters such as personnel decisions regarding clergy because the church-minister relationship is outside the state's competence).

<sup>97</sup> See Val D. Ricks, *To God God's, to Caesar Caesar's, and to Both the Defining of Religion*, 26 CREIGHTON L. REV. 1053, 1102 (1993).

<sup>98</sup> Both courts and commentators have suggested the possibility of deferring to religious organizations in other contexts. See, e.g., *Dickinson v. United States*, 203 F.2d 336, 344 (9th Cir.) (suggesting the court might have deferred to a religious organization's claim that an employee was a minister for purposes of triggering an exception to Selective Service registration), *rev'd on other grounds*, 346 U.S. 389 (1953); Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 102 (2004) (urging that courts should "defer to religious organizations regarding the characterization of their activities as religious or nonreligious" in collective bargaining disputes).

<sup>99</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981).

<sup>100</sup> *United States v. Seeger*, 380 U.S. 163, 166 (1965); see also Steven D. Collier, Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 977-82 (1982) (detailing the history of the Court's efforts to define religion, and explaining that the definition increasingly broadened). But see Eduardo Peñalver, Note, *The Concept of Religion*, 107

what constitutes religion affords a greater opportunity to religious individuals and groups to define religion for themselves; in this respect, the more expansive the definition of religion, the more deference is granted to the claimants of religion for purposes of constitutional protection.<sup>101</sup> A deferential primary duties test fits well with this jurisprudence.

The Supreme Court's explicit approval of deference in the contexts of academic and partnership promotion and expressive association provides further support for a deferential primary duties test.<sup>102</sup> When reviewing employment discrimination claims in academic tenure cases, courts have repeatedly deferred to an educational employer's assessment of a professor's scholarship and other qualifications.<sup>103</sup> Because such determinations "are subjective, . . . they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges."<sup>104</sup> Courts also have deferred to an employer's analysis of an employee's qualifications in the context of law firm partnership decisions. One court recognized that it must not "substitute[] its own subjective judgment for that of [the employer] in determining that [the employee] met the firm's partnership standards."<sup>105</sup> A deferential primary duties test likewise respects that assessing the spiritual weight of a job duty is an inherently subjective inquiry that falls outside of a court's competence. Just as courts approach promotion cases "with

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YALE L.J. 791, 798 (1997) (arguing that the Supreme Court "shifted back toward a narrower conception of religion in *Wisconsin v. Yoder*").

<sup>101</sup> At least one lower court has purported to grant complete deference to those involved in a religious activity to define their religion. See *Kolbeck v. Kramer*, 202 A.2d 889, 892 (N.J. Super. Ct. Law Div. 1964) ("There is no right in a state or an instrumentality thereof to determine that a cause is not a religious one."). For an argument that courts should give partial deference to religions to define themselves for purposes of constitutional protection, see Ricks, *supra* note 97, at 1100-07.

<sup>102</sup> The Court's use of deference in these other contexts is subject to the normative criticism that it allows organizations to perpetuate an opaque system that prefers members of majority groups to other demographics. See Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 9-19 (2006). Normative concerns, although still present, are less pronounced in ministerial exception cases because courts not only are less competent to judge religious significance, but also may be constitutionally barred from doing so.

<sup>103</sup> See, e.g., *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) (explaining that federal courts "operate with reticence and restraint regarding tenure-type decisions"); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975) (observing that "the criteria and procedures established by a university for promotion and reappointment of faculty members are controlling," and, provided some minimal procedural regulations are met, "the court should not substitute its judgment for that of the university authorities"); see also Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 961 (1982) (describing the "hands-off" doctrine adopted by courts in the tenure and promotion context).

<sup>104</sup> *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 548 (3d Cir. 1980).

<sup>105</sup> *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 513 (3d Cir. 1993).

great trepidation”<sup>106</sup> and a desire not to interfere with subjective and scholarly judgments by “sit[ting] as a ‘super personnel council,’”<sup>107</sup> courts in ministerial exception cases should be wary of displacing a church’s religious judgments.

Similarly, the Court has approved of deference in expressive association cases. In *Dale*, the Supreme Court explained that it must “give deference to an association’s assertions regarding the nature of its expression, [and] must also give deference to an association’s view of what would impair its expression.”<sup>108</sup> This emphasis on judicial deference to expressive messages requires not that an association conclusively demonstrate impairment of its message, but that it make a *colorable assertion* that conflict exists.<sup>109</sup> Expressive association doctrine supports a deferential primary duties test because a church’s conception of what qualifies as spiritual counts as part of its religious message. Courts should vindicate constitutional rights by deferring to a religious organization’s assertions regarding the nature of its religious expression and an employee’s effect on that expression.

## V. POTENTIAL OBJECTIONS TO A DEFERENTIAL PRIMARY DUTIES TEST

### A. *Would a Deferential Primary Duties Test Itself Violate the Establishment Clause?*

Courts and commentators have long acknowledged the potential catch-22 in Religion Clause jurisprudence: if churches receive special protection, perhaps to vindicate free exercise rights, might this protection itself violate the Establishment Clause? Although critics of a deferential primary duties test could raise Establishment Clause concerns, the Supreme Court has long recognized that accommodation of spiritual interests does not automatically “devolve into ‘an unlawful fostering of religion.’”<sup>110</sup> Recently, the Court upheld a statute creating a religious accommodation for institutionalized persons, reasoning that the statute “fits within the corridor between the Religion Clauses” and was

<sup>106</sup> *Jiminez*, 57 F.3d at 376.

<sup>107</sup> *Id.* (quoting *Brousard-Norcross v. Augustana Coll. Ass’n*, 935 F.2d 974, 976 (8th Cir. 1991)) (internal quotation mark omitted).

<sup>108</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000). The Court further stated that “a State, or a court, may not constitutionally substitute its own judgment for that of the [p]arty” asserting an expressive association right. *Id.* (quoting *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123–24 (1981)) (internal quotation marks omitted).

<sup>109</sup> See Tushnet, *supra* note 7, at 86.

<sup>110</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 145 (1987)).

not in tension “with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.”<sup>111</sup> Any Establishment Clause objection to a deferential primary duties test should likewise fail because the motivation for according deference would stem from protecting a religious organization’s First Amendment rights.

*B. Could Religious Employers Abuse  
a Deferential Primary Duties Test?*

Because a deferential primary duties test would grant greater leeway to a religious organization regarding the spiritual significance of a particular employee’s job duties, a church could abuse the test by falsely claiming that certain responsibilities were religious to avoid liability. Three checks would prevent abuse from unduly undermining the ministerial exception, however.

First, deference does not imply complete acquiescence.<sup>112</sup> A deferential primary duties inquiry would function as a “smell test”: if a religious organization made a facially implausible claim such as, for example, that all employees played a central role in the spiritual mission of the church, a court could investigate the sincerity of that claim.<sup>113</sup> As the *Dale* Court recognized in the expressive association context, deference does not mean that bald assertions can suffice if they are clearly contradicted by reality.<sup>114</sup> So too must a religious organization tether its assessment of an employee’s spirituality to facts in the record by pointing to specific job duties and making a colorable claim that those duties are religious.<sup>115</sup> A deferential primary duties test thus

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<sup>111</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

<sup>112</sup> *Cf. Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531 (3d Cir. 1993) (explaining that deferring to a law firm’s analysis of an associate’s subjective suitability for partnership does not “insulate the partnership decision from all review” since evidence that the employer had overlooked similar deficiencies in nonmembers of the protected class would be sufficient to show pretext and negate deference). Courts in ministerial exception cases have adopted different approaches to whether they can examine the religious motivation behind a church’s employment decisions regarding its ministers for evidence of pretext. *See* *Petition for Writ of Certiorari* at 10–17, *Petruska v. Gannon Univ.*, No. 06-985, 2007 WL 128608, *cert. denied*, 127 S. Ct. 2098 (2007).

<sup>113</sup> For example, the Fifth Circuit once rejected a seminary’s argument that all of its employees, from faculty to support staff, functioned as ministers. *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 283–85 (5th Cir. 1981). Although this case suggests one possible red flag, it is difficult to delineate in advance what set of facts would overcome deference to a religious employer’s assessment of primary duties because an employee’s ministerial status is necessarily fact-specific.

<sup>114</sup> *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (considering whether facts in the record supported the Boy Scouts’ position because deference does not mean “that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message”).

<sup>115</sup> The Supreme Court arguably has suggested a similar smell test in the context of religious exemptions to military obligations. The Court articulated an expansive definition of religion, but

would have maximum impact in close cases in which the spiritual significance of an employee's duties is open to dispute. In those instances, deference would require that the religious organization's sense of its spiritual mission trump a secular court's conception.

Second, courts would still determine which job duties an employee performed and how much time he spent on each. Churches would receive no deference regarding which duties existed, so they could not easily manufacture false responsibilities.

Third, a church's accountability to its adherents and to the public at large would act as a check on abuse. Religious employers face pressure to conform to moral standards, which could limit abusive evasion of antidiscrimination laws.<sup>116</sup> This concept is perhaps best illustrated by ministerial exception case law itself. Some courts have allowed sexual harassment lawsuits brought by ministers to proceed when the church does not offer a religious justification for the harassment.<sup>117</sup> Although churches could claim immunity from liability by arguing that the harassment was religiously motivated, they have generally "condemn[ed] [harassment] as inconsistent with their values and beliefs" and sought dismissal on other grounds.<sup>118</sup> Although the potential for abuse may not be entirely eliminated, internal and external constraints on religious organizations lessen this potential.

*C. Would a Deferential Primary Duties Test Allow Too Much  
Discrimination by Too Many Employers?*

Even ignoring potential abuse, the concern remains that a church's honest assessment of the spiritual role of employees could render too many of them ministers. Courts have extended the ministerial exception to religiously affiliated institutions beyond churches themselves,<sup>119</sup>

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explained that "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981).

<sup>116</sup> In this respect, a religious organization differs from other corporations. While any organization faces pressure to act in a manner that is acceptable to the audience that sustains its existence, churches exist for the very purpose of transmitting a moral message. Therefore, religious adherents may be more likely to demand conformance to moral standards as compared with consumers of other corporations. Of course, this accountability check would not prevent a church from discriminating when its adherents approved of the discrimination. This problem must be separated, however, from the concern that a church would *falsely* claim that an employee performed spiritual duties to mask discrimination not condoned by church doctrine. The ministerial exception's purpose is to protect churches that discriminate in accordance with religious tenets even if mainstream society disapproves of the denomination's moral choices.

<sup>117</sup> See, e.g., *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948, 950 (9th Cir. 1999).

<sup>118</sup> *Id.* at 947.

<sup>119</sup> See, e.g., *Shaliesabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 301 (4th Cir. 2004) (applying the ministerial exception to bar claims brought by the kosher supervisor at a Jewish-affiliated nursing home); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d

and if more employees qualify as ministers under a deferential test, the breadth of the ministerial exception could threaten the vitality of employment discrimination laws.

Rather than suggesting the impropriety of a deferential primary duties test, however, this concern illustrates the problem with defining what counts as a religious organization entitled to invoke the ministerial exception in the first instance. Although lower courts have engaged in case-by-case analyses to determine whether organizations qualify as religious institutions entitled to invoke the statutory exemption under Title VII for religious discrimination,<sup>120</sup> no court has issued a categorical rule regarding which institutions qualify as religious organizations.<sup>121</sup> A thorough examination of the problem of defining a religious organization is outside the scope of this Note, but it is important to separate this concern from criticism that a deferential primary duties test would render the ministerial exception too broad. The argument that certain groups should not receive deference because they are not actually religious organizations does not undermine the notion that when an organization clearly qualifies as religious, deference ought to be given to its assessment of its employees' spiritual duties.

Furthermore, the breadth of the ministerial exception may be overestimated. The ministerial exception is "robust where it applies," but its applications are limited.<sup>122</sup> It does not apply to all church employees — hence the need to separate ministers from lay employees, even if by using a deferential test — and it does not bar every claim brought by ministers.<sup>123</sup> Although the ministerial exception has been recognized for over thirty-five years, in practice it has prevented consideration of relatively few employment discrimination claims.<sup>124</sup> A deferential primary duties test is unlikely to intolerably alter this balance.

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360, 362–63 (8th Cir. 1991) (allowing a religiously affiliated hospital to invoke the ministerial exception).

<sup>120</sup> See, e.g., *Killinger v. Samford Univ.*, 113 F.3d 196, 198–200 (11th Cir. 1997).

<sup>121</sup> See Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2010–11 (2007) (explaining that "circuit courts have provided little guidance in determining what institutions qualify for the ministerial exception").

<sup>122</sup> *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000). In addition, the exception has not been automatically extended to immunize religious employers from liability under other laws. See *supra* p. 1779.

<sup>123</sup> For example, several courts have held that although the ministerial exception prevents review of hiring-based Title VII claims, courts may review sexual harassment Title VII claims brought by ministers against religious organizations if the harassment was not religiously motivated. See, e.g., *Bollard*, 196 F.3d at 948, 950.

<sup>124</sup> A search of Westlaw's ALLCASES database with no date restriction revealed only 150 cases in which the term "ministerial exception" has appeared. In 2007, the term "ministerial exception" appeared in only 19 cases. By contrast, in 2007 the term "Title VII" appeared in 6196 cases. Although this search does not account for potential plaintiffs who are chilled from bringing suit be-

*D. Would Limiting the Ministerial Exception to Ordained Ministers Be Preferable to Adopting a Deferential Primary Duties Test?*

Even accepting the case for a deferential determination of ministerial status, the question arises whether a bright-line rule might be preferable to a deferential primary duties test. Specifically, courts could defer to a church's conception of which employees qualify as ministers by limiting the ministerial exception to ordained ministers. Although this approach would offer the benefits of simplicity and objectivity, it would also create new problems. First, a bright line based on ordination would not adequately protect the First Amendment interests of religious employers because many employees play significant spiritual roles even though they are not formally ordained.<sup>125</sup> Second, this modification would present practical difficulties because some religions ordain all members,<sup>126</sup> and some religions do not formally ordain any adherents.<sup>127</sup> Establishment Clause problems could exist if the exception favored only religious groups that rely on formal ordination to distinguish ministers.<sup>128</sup> Accordingly, a deferential primary duties test better tracks and vindicates the Religion Clauses' protections.

#### CONCLUSION

The ministerial exception has grown out of a need to ensure that the application of antidiscrimination laws does not violate rights under the Religion Clauses. Although courts have rightly focused on employees' job functions to determine ministerial status, judicial review of the spiritual importance of an employee's primary duties itself may impinge on the Religion Clauses' guarantees. A deferential primary duties test would address this constitutional concern without unduly undermining antidiscrimination laws. Courts would better serve the First Amendment by keeping the Religion Clauses in mind not only when adopting, but also when applying, the ministerial exception.

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cause of the existence of the exception, the numbers still seem to belie the notion that the exception severely undermines Title VII.

<sup>125</sup> The primary duties test also reaches the more sensible result that an employee who happens to be ordained but who performs purely secular tasks will not qualify as a minister. *See, e.g.*, *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 284 (5th Cir. Unit A July 1981).

<sup>126</sup> *See, e.g.*, *Jehovah's Witnesses: Worship and Conventions*, <http://www.jw-media.org/people/worship.htm> (last visited Apr. 5, 2008) (explaining that Jehovah's Witnesses consider all baptized members to be ordained ministers).

<sup>127</sup> *See, e.g.*, *Quaker Theology*, <http://www.quaker.org/quest/issue-9-FUM-03.htm> (last visited Apr. 5, 2008) (explaining that in the Quaker religion "all Friends insist on being open to the gifts in ministry with which God endows other members" but that the organization does not "use the language of priesthood to name the exercise of these gifts").

<sup>128</sup> *See Larson v. Valente*, 456 U.S. 228, 246-47 (1982) (explaining that laws that grant denominational preferences are suspect under the Establishment Clause).